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No. 83-1709

In The
Supreme Court of the United States
October Term 1983

SHELDON STEIN,
Petitioner,

vs.

ANGELO GAGLIARDO,
Respondent.

REPLY BRIEF OF PETITIONER, SHELDON STEIN

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THE ABSTENTION DOCTRINE HAS NO APPLICATION WHERE STATE QUASI-CRIMINAL PROCEEDINGS ARE THREATENED, BUT NOT FILED

The substance of Respondent Gagliardo's Brief in Opposition to Petition for Certiorari is that the District Court properly abstained from exercising jurisdiction because ". . . [t]he Ohio disciplinary procedure is part of the ongoing judicial proceedings of the Ohio Supreme Court . . ." (Brief of Respondent at 3), and that Petitioner Stein was, therefore, involved in state judicial proceedings when he filed suit.

This statement is misleading and distorts that which has transpired in this case. While it is true that the Ohio Supreme Constitution grants to the Ohio Supreme Court the power to regulate attorneys in Ohio, it does *not* follow that every communication between the Ohio Supreme Court or one of its employees with a member of the Ohio Bar is part of a formal judicial proceeding so as to require the application of the abstention doctrine of *Younger vs. Harris*, 410 U.S. 37 (1971).

The Ohio Supreme Court has promulgated rules of professional conduct by which all attorneys admitted to practice in Ohio are bound. These rules are known as the Ohio Code of Professional Responsibility.

Attorneys who violate the Code of Professional Responsibility are subject to discipline pursuant to the provisions of Rule V of the Supreme Court's Rules for the Government of the Bar (hereinafter "Rule V"). The punishment can range from disbarment to a public reprimand.

The Ohio Supreme Court has created a quasi-judicial administrative body, The Board of Commissioners on Grievances and Discipline. Rule V specifies that the Board of Commissioners on Grievances and Discipline is the body empowered to consider, at the first instance, charges pending against attorneys practicing law in the State of Ohio. "The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court. . . ." Rule V (2).

The Ohio Supreme Court has also created the position of the Disciplinary Counsel. The Disciplinary Coun-

sel, in this case Respondent Gagliardo, serves a prosecutorial function with respect to the charges of alleged misconduct by lawyers. The Disciplinary Counsel is *not* a judicial or quasi-judicial official. His only function, according to Rule V, is ". . . [to investigate and thereafter] . . . file a complaint with the Board of Commissioners on Grievances and Discipline." A copy of this letter is reproduced on page 30 of the Appendix to the Petition for Writ of Certiorari.

This case was filed in the District Court on June 9, 1983. Until that time the only action that had taken place was a series of letters sent by Gagliardo to Stein, in which Gagliardo threatened to file a formal complaint with the Board of Commissioners of Grievances and Discipline unless Stein ceased from activities, protected by the First Amendment, which he had undertaken in the past. Copies of these letters are reproduced on pages 19-30 of the Appendix to the Petition for Writ of Certiorari.

The record clearly demonstrates that a formal complaint was not filed until after "proceedings of substance on the merits" had taken place in the District Court, and that this case falls within the ambit of *Hicks vs. Miranda,* 422 U.S. 332 (1975), which holds that *Younger* abstention has no application where a formal state proceedings is commenced after there has been "proceedings on the substance on the merits" in the federal action.

As of June 9, 1983, when Stein filed his complaint in the District Court (and even as of June 24, 1983, when same was dismissed), *no* formal complaint had been filed against Stein with the Board of Commissioners on Grievances and Discipline. *No* judicial or quasi-judicial body

had been convened with respect to this controversy, *nor* had any such body attempted to exercise jurisdiction over Stein. It was not until July 1, 1983, well after the case went to judgment, a Notice of Appeal filed to the United States Court of Appeals for the Sixth Circuit, the appeal docketed, and after the Court of Appeals denied Stein's request for an injunction, that Gagliardo filed a formal complaint against Stein with the Board of Commissioners on Grievances and Discipline.

Although disbarment proceedings are quasi-criminal in nature, *In Re Ruffalo,* 390 U.S. 544, 551 (1967); *Ex Parte Garland,* 71 U.S. (4 Wall) 333, 380 (1866), an analogy can be drawn between them and the typical criminal case in that both types of cases seek to impose some sort of a penalty. Although the investigation of a criminal case is part of the ongoing state criminal judicial proceedings, this court in *Younger and Steffel vs. Thompson,* 415 U.S. 452, 475 (1974) held that federal relief "[i]s not precluded when *no* state prosecution is pending and a federal plaintiff demonstrates a genuine *threat* of enforcement of a disputed state crimminal state. . . ." (emphasis added). See, generally, 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Sec. 4253, pp. 555-6. This holding applies with equal force to the case at bar.

Stein was faced, at the time that he filed suit, with a "Catch-22" situation. He had been instructed to cease activities which are protected by the First Amendment, and had been threatened with disbarment proceedings if he failed to do so. A formal complaint had not been filed with the Board of Commissioners on Grievances and Discipline or pending before the Ohio Supreme Court so that Stein could raise his constitutional challenges to certain

provisions of the Ohio Code of Professional Responsibility. Stein filed suit because he was faced with the unenviable choice of foregoing protected constitutional activity in the face of the threat of punishment and possible professional ruination, or flouting state law and risking disbarment. Consequently, Stein had to cause "state judicial proceedings" to be commenced against him to raise his constitutional challenges. *That* is precisely the reason that *Younger vs. Harris* sanctions abstention *only* where there are "pending state judicial proceedings". Absent such "pending state judicial proceedings", Stein did not have a forum in which he could litigate the constitutional issues. As this Court noted in *Steffel,* one should not have to face the "Scylla of intentionally flouting state . . . [law] and the Charybdis of foregoing what [they] believe to be constitutionally protected activity." 415 U.S. at 462.

Based upon the foregoing, the Respondent's argument in opposition to the granting of a Writ of Certiorari in this case lacks merit. For the reasons set forth in this Brief and in the Petition for Writ of Certiorari, the Petitioner respectfully prays the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to review and decide this case.

Respectfully submitted,

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APPENDIX

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OHIO SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR

(Excerpts)

Rule V

DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on July 1, 1983, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline of the Bar. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline of the Bar. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. The members of such Board shall be appointed from each of the Ohio Appellate District as follows: District 1, two members; District 2, one member; District 3, one member; District 4, one member; District 5, one member; District 6, two members; District 7, one member; District 8, three members; District 9 one member; District 10, two members; District 11, one member; and District 12, one member. Initial appointments under this rule shall be made as follows: Members appointed from former districts one (1), four (4), six (6), seven (7), eleven (11), twelve (12), thirteen 13), and fifteen (15), with remaining terms shall continue to serve for the same term for the new districts one (1), six (6), two (2), ten (10), nine (9), eight (8), eleven (11), and seven (7), respectively. The member appointed from new district three (3) shall be selected by

majority vote of the Supreme Court, from among the members appointed from former districts three (3) and sixteen (16). The member appointed from new district four (4) shall be selected, by majority vote of the Supreme Court, from among members appointed from former district eight (8) and seventeen (17). The member appointed from new district five (5) shall be selected, by majority vote of the Supreme Court, from among the members appointed from former districts nine (9) and ten (10). The members selected from districts three (3), four (4) and five (5) shall continue to serve their present term. The remaining members shall be appointed by this Court for the following terms: One (1) member from district one (1) for the term ending 12-31-83; one (1) member from district six (6) for the term ending 12-31-85; one (1) member from district eight (8) for the term ending 12-31-84; one (1) member from district eight (8) for the term ending 12-31-85; one member from district ten (10) for the term ending 12-31-85; one member from district twelve (12), for the term ending 12-31-85. Thereafter the term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment with each member eligible for reappointment to one succeeding term. Any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any

cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof. The Board of Commissioners shall meet in Columbus, Ohio, the first Friday after the second Monday during the months of February, April, June, August October and December. The Chairman or the Secretary of the Board may call additional meetings of the Board when necessary.

(2) Jurisdiction of the Board. The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court as hereinafter provided:

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension from the practice of law, or

(b) concerning the mental illness of any attorney and counselor at law or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct by an attorney affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court or a breach of these rules but did not take place in the presence of the court or a member thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of this Court to impose

punishment with reference either to contempts or breaches of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to Disciplinary Counsel any matters coming to its attention for investigation, as hereinafter provided.

There is hereby created the position of Disciplinary Counsel. The Supreme Court shall appoint a Disciplinary Counsel and such assistants as necessary who shall be attorneys at law admitted to practice in this State and who shall not engage in the private practice of law while serving in that capacity.

In the event that a Grievance Committee of a local bar association determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the Chairman of the Grievance Committee of the local bar association may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of the investigation to the committee which requested it.

All complaints alleging violations of DR 2-101 and DR 2-102(A) and (B) shall be referred to or filed with Disciplinary Counsel. Disciplinary Counsel shall have exclusive authority to investigate such complaints, file formal complaints with the Board and prosecute formal complaints filed with the Board. All formal complaints filed

with the Board alleging violation of DR 2-101 and DR 2-102(A) and (B) shall be filed by the Disciplinary Counsel in the name of Disciplinary Counsel as relator. Proceedings in such matters shall be conducted in the same manner as all other disciplinary proceedings provided for in this rule.

The Disciplinary Counsel shall appoint, with the approval of the Supreme Court, staff personnel as required to satisfactorily complete investigation of matters referred to him pursuant to these rules or filed with him pursuant to Rule II of the Supreme Court Rules for the Government of the Judiciary. The Supreme Court shall fix the compensation of the Disciplinary Counsel and personnel employed by the Disciplinary Counsel and provide office facilities, furnishings, stationery, equipment and office supplies for the Disciplinary Counsel.

Funds for the operation of the Disciplinary Counsel's office, including compensation of the Disciplinary Counsel, and staff, shall be provided from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

The Disciplinary Counsel shall be under the supervision of and responsible to the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar and the Board of Commissioners on Grievances and Discipline of the Judiciary created in Rule II of the Supreme Court Rules for the Government of the Judiciary, and shall file annually with the Supreme Court and the Secretary a report of the activities and accomplishments of his office and a report of the expenses of operation of his office.

(4) Application of Rule; Authority and Duty of Bar Committees and Disciplinary Counsel. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension or disbarred from the practice of law; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Disciplinary Counsel and any committee authorized by any regularly organized local bar association shall investigate any matter referred to them or which comes to their attention, and may cause a complaint to be filed pursuant to this rule in cases where they find reasonable cause to believe that misconduct has occurred or that a condition of mental illness exists.

The investigation of complaints with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law shall be conducted by Disciplinary Counsel or the Grievance Committee of a local bar association. A local bar association may provide by its constitution, regulations or rules, for the appointment of lay persons as members of its grievance committee, provided that the majority of such committee shall consist of attorneys at law admitted to the practice of law by this Court.

The investigation of complaints shall be concluded within sixty days from the date of the receipt of the complaint. A decision as to the disposition of such complaint shall be made within thirty days thereafter. Extensions of time for completion of the investigation may be granted

upon written request, and for good cause shown, by the Secretary or Acting Secretary, of the Board of Commissioners on Grievances and Discipline of the Bar. If the investigation is not completed within sixty days from the date of filing the complaint and no written request has been made for an extension of time, the matter under investigation shall be referred to the Disciplinary Counsel. No extension of time shall be granted beyond one-hundred-fifty days from the date of receipt of the complaint. If an investigation by the Grievance Committee of a local bar association is not completed within one-hundred-fifty days from the date of filing the complaint, the matter under investigation shall be referred to the Disciplinary Counsel.

If a committee or Disciplinary Counsel determines upon investigation of a complaint that the filing of a formal complaint with the Board of Commissioners on Grievances and Discipline of the Bar is not warranted, the complainant shall be notified in writing of that determination.

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(9) The Complaint; Where Filed; By Whom Signed. A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Complaints filed by a Grievance Committee of any regularly organized local bar association in the State shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed by the President, Secretary, or Chairman of the Grievance Committee of any reg-

ularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Realtor believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

Complaints filed by Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as relator.

Upon the filing of a complaint with the Secretary of the Board, relator shall forward a copy thereof to Disciplinary Counsel and the local bar association of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.

(10) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by certified mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint. Extensions of time for the filing of the answer may be granted, for good cause shown, by the Secretary of the Board of Commissioners.

(b) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (c) hereof, the Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

(c) Examination. If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(d) Duty of Clerk on Entering Order. Upon the entry of an order suspending an attorney for mental illness, the Clerk of the Court shall mail certified copies thereof as provided in paragraph one of Section (20) and shall change the registration of respondent to inactive status. No publication of such order shall be made but the order shall be a matter of public record.

(e) Termination. Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(11) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Sec-

retary of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes. Requests for continuances may be granted by the Chairman of the panel for good cause shown.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(12) Authority of Panel; Dismissal. If the panel finds that the complaint or evidence is insufficient to support a charge of misconduct the panel may order that the complaint be dismissed. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, Disciplinary Counsel, and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.

(13) Referral by Panel. In the alternative if the panel determines that findings of fact and recommendations for dismissal should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal in the same manner as provided in the following sections of this Rule V with respect to public reprimand, suspension or disbarment.

• • •

(20) Review by Court; Reimbursement for Expenses of Board, Duty of Clerk on Entering Order; Duties of Disqualified or Resigned Attorney.

(a) After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, or acceptance of resignation from the practice of law, the Clerk of this Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent attorney (at his last known address), to the Disciplinary Counsel, to the local bar association or associations in the county or counties in which such attorney resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit, and to the Supreme Court of the United States.

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